STATE OF MICHIGAN

COURT OF APPEALS

RUSSELL ALLGAIER,

Plaintiff-Appellant,

v

CITY OF WARREN,

Defendant-Appellee.

UNPUBLISHED
August 22, 2006

No. 268102
Macomb Circuit Court
LC No. 2005-000127-NO

Before: Davis, P.J., and Sawyer and Schuette, JJ.

DAVIS, J. (*dissenting*).

I agree with the majority's notice analysis and determination that the trial court erred in granting summary disposition on that basis. I dissent because I disagree with the majority's alternative basis for affirming summary disposition. For the reasons stated below, I would reverse.

The trial court found a genuine question of fact as to whether plaintiff had rebutted the statutory inference in MCL 691.1402a that the sidewalk was in reasonable repair. I agree with the trial court on that issue. As the majority notes, that statute provides a *rebuttable inference* that the sidewalk was in reasonable repair if there is less than a two-inch discontinuity defect. As the majority also notes, defendant's engineer admitted that defendant had adopted a stricter standard of ¾ inches and that the sidewalk was actually in need of repair, and plaintiff's expert testified that the height differential here was unreasonably dangerous at 1½ inches. Either of, and certainly both of these pieces of evidence in combination may be sufficient to rebut a statutory inference and to create a question of material fact. The majority dismisses defendant's adoption of a stricter standard as irrelevant. I disagree.

As a general proposition, a municipality may adopt more stringent protections than the state would suggest, in the same way that a state's constitution may provide more stringent protections than the United States Constitution. The statute here is merely a rebuttable inference establishing a statewide minimum standard. The policy defendant adopted, in contrast, reflects its own considered opinion that within the specific context of its own locality, sidewalks are no longer "in reasonable repair" when a discontinuity defect exceeds ¾ inches. Defendant's policy does not itself rebut the presumption of reasonable repair, but rather it tends to rebut the presumption that, *in that location*, a discontinuity defect must exceed two inches in order to rebut that presumption. Testimony that the defect exceeded defendant's standard, and further

testimony that the sidewalk was, in fact, in need of repair as a "trip hazard," tend to rebut the presumption.

The trial court correctly concluded that there was a question of fact whether the sidewalk was in reasonable repair. Whether plaintiff has established that the sidewalk was in need of repair is an issue that should be weighed by the trier of fact, not by a judge on a motion for summary disposition.

I would reverse.

/s/ Alton T. Davis